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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re Marriage of MYLA and RICARDO
PAMANIAN.

B169026

(Los Angeles County
Super. Ct. No. PD025048)

MYLA BASALLAJE,

Respondent,

v.

RICARDO PAMANIAN,

Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Patricia M.
Ito, Judge. Reversed.

Francis E. Smith for Appellant.

No appearance for Respondent.

Ricardo Pamanian appeals from an order modifying the community property distribution in the judgment of dissolution entered pursuant to a marital settlement agreement. He argues the Family Code controls the modification and that his former wife, respondent Myla Basallaje failed to establish grounds for modification under that statutory scheme. We agree, and reverse the modification order.

FACTUAL AND PROCEDURAL SUMMARY

Ricardo Pamanian and Myla Basallaje were married in 1988 and separated 10 years later. They had three children, who were minors at the time of dissolution. Judgment of dissolution was entered in 1999, following a default proceeding. The factual basis for the judgment was established by declaration, under Family Code section 2336. (All statutory references are to the Family Code unless another is indicated). The judgment incorporated the marital settlement agreement reached by the parties.

The integrated settlement agreement recited that the parties entered into the agreement without benefit of legal counsel and that they “fully understand the consequences thereof.” Each party expressly waived “any right which he or she may have to an absolute equal division of said community property.” Wife was to quitclaim her interest in the family residence in Stevenson Ranch to husband, who would then own it as his separate property. The settlement agreement stated: “When the property is offered for sale, the net proceeds shall be divided equally.” Wife was ordered to pay community obligations of \$19,000, and she agreed to pay \$700 monthly child support to husband until each child “marries, dies, reaches majority, reaches age 19 and is still a full time high school student, becomes emancipated, or there is a further order of the court.” Husband was to provide health insurance for the children, and the parties were to share uninsured health care and child care costs equally.

In September 2002, wife sought and obtained an order to show cause asking the trial court to order sale of the family residence, for an accounting of the equity on that property, and for restitution of equity which, she alleged, had been depleted or dissipated by husband. She declared that while the equity in the family residence amounted to at

least \$100,000 at the time the marriage was dissolved, she believed that husband had encumbered the property by refinancing and taking out a line of credit.

In response to the OSC, husband claimed that he and his ex-wife had agreed to refinance the existing home loan after they separated, but before the petition for dissolution was filed. They both executed the deed of trust for \$155,000. In compliance with the terms of the judgment of dissolution, wife executed a quitclaim deed conveying her interest in the property to husband. Husband argued that the marital settlement agreement and judgment made no provision for dividing the equity in the house, and provided only that, upon sale, the net proceeds would be divided equally. Husband also argued that he was compelled to refinance the residence because of wife's failure to pay court ordered child support and her failure to repay a loan he had made to her from his 401k plan. Husband argued the family court lacked jurisdiction to modify the final judgment on the grounds raised by wife, because Family Code sections 2120 et seq. controlled the modification of property distributions sought more than six months after entry of the judgment of dissolution.

Wife filed a supplemental declaration in response, asserting that the loan from the 401k plan was based on her community interest in those funds, that the \$20,000 loan should be handled as a separate contract action, and that she was paying child support, including payments on the arrearages. She did not address husband's argument that her only remedy was under sections 2120 et seq.

The trial court issued a tentative ruling proposing to grant wife's motion, finding that the judgment "clearly contemplated sale of the . . . property" because it referred to "when" the house was sold rather than "if" it was sold. The court did not address husband's argument that the Family Code controlled modification of the judgment. It concluded that husband had acted in derogation of wife's rights by refinancing the residence and failing to list it for sale. The court ordered that it be sold. Based on a finding that husband had acted wrongfully in encumbering the property and in refusing to sell it, the court imposed a constructive trust pursuant to Civil Code section 2224. Husband was ordered to provide wife with information on any depletion of equity in the

home after the entry of the judgment of dissolution, and to pay her half of that amount plus one-half of any net sale proceeds.

Husband objected to the order on the ground that wife had failed to establish either fraud or mistake, prerequisites to the modification of a judgment of dissolution under section 2122. He pointed out that wife had executed a quitclaim deed conveying all of her rights to the property to him. Husband also argued that Civil Code section 2224 does not apply in this family law action and that wife had failed to present evidence warranting the imposition of a trust under that statute. Finally, he argued wife should not be given the relief she sought since she had unclean hands due to her failure to pay child support until the District Attorney obtained a wage assignment.

Following a hearing, for which we do not have a reporter's transcript, the trial court entered an order in conformity with its tentative ruling. It did not address husband's arguments that the Family Code controlled, and imposed a constructive trust under Civil Code section 2224. Husband filed a timely appeal from that order. Wife did not file a brief on appeal.

DISCUSSION

In 1993, the Legislature enacted a comprehensive statutory scheme governing motions to set aside family law judgments. In doing so, the Legislature sought to resolve what it described as "considerable confusion" which had "led to increased litigation and unpredictable and inconsistent decisions at the trial and appellate levels." (Stats. 1993, ch. 219, § 108; § 2120, subd. (d).) This law is now found in Chapter 10 of division 6, part 1 of the Family Code sections 2120-2129 ["Chapter 10"].¹ Before the Legislature stepped in, a family law judgment could be set aside within six months after entry under

¹ This statutory scheme governing relief from family law judgments originally was enacted as Code of Civil Procedure section 4800.11, before the enactment of the Family Code. (Stats. 1993, ch. 219, § 108.) Upon adoption of the Family Code, section 4800.11 was reenacted as Family Code sections 2120 through 2129 without substantive change. (Cal. Law Revision Com. com. 29C West's Ann. Fam. Code (1994 ed.) foll. §§ 2120-2129, pp. 546-550.)

Code of Civil Procedure section 473, and afterward under the common law doctrine of extrinsic fraud. The courts, however, had found the definition and application of extrinsic fraud to warrant relief from a family law judgment ““repetitively troublesome.”” (See *In re Marriage of Heggie* (2002) 99 Cal.App.4th 28, 32.)

The new statutory scheme applies to all judgments, such as the one in this case, entered after January 1, 1993. (§ 2129.) Although husband presented points and authorities arguing that wife was restricted to relief under the Family Code, the family court did not address that authority and imposed a constructive trust under Civil Code section 2224. As we shall explain, the trial court erred in failing to apply the Family Code.

Chapter 10 retains the previous practice of allowing relief from a judgment within six months under Code of Civil Procedure section 473. (§ 2121.) Because wife waited until nearly three years after entry of the judgment, that procedure was unavailable to her.

Chapter 10 has been construed as the exclusive procedure for modifying or setting aside a marital property distribution once the six-month limit for relief under Code of Civil Procedure section 473 has passed. Section 2121, subdivision (a) provides: “In proceedings for dissolution of marriage, . . . the court may, on any terms that may be just, relieve a spouse from a judgment, or any part or parts thereof, adjudicating support or division of property, after the six-month time limit of Section 473 of the Code of Civil Procedure has run, *based on the grounds, and within the time limits, provided in this chapter.*” (Emphasis added.) The Court of Appeal in *In re Marriage of Heggie* concluded that this language made resort to Chapter 10 mandatory: “[A]fter the six months pass, the litigant is limited to just the grounds specified in section 2122, and still faces some time limits.” (99 Cal.App.4th at p. 32.)

In *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, the court reached the same conclusion. In that case, a wife filed a civil action seeking to set aside a marital dissolution judgment on grounds of fraud and perjury. She alleged 10 tort and equitable causes of action, and sought imposition of a constructive trust and damages. The court looked beyond the pleading to the gravamen of the complaint, which was an attack on the

dissolution judgment on grounds of fraud and perjury. It concluded that section 2120 was enacted “to address these very circumstances,” and concluded that section 2122 governed the matter irrespective of the various legal theories pled in the complaint. (*Id.* at p. 1146.)²

Section 2122 allows the court to set aside a property distribution on a showing of actual fraud, perjury, duress, mental incapacity, or mistake. “[T]he moving party must establish *both* the presence of at least one of the five factors listed in section 2122, and that this resulted in material disadvantage to the moving party [under section 2121, subdivision (b)]³.” (*In re Marriage of Rosevear* (1998) 65 Cal.App.4th 673, 685, fn. 11.)

Wife provided two declarations stating that husband had improperly encumbered the residence and delayed in listing it for sale. From this, we conclude that she makes no claim of either perjury or mental incapacity. Under section 2122, subdivision (c) a motion to set aside a property distribution on the ground of duress must be brought within two years of entry of judgment. A motion to set aside brought on the grounds of mistake must be brought within one year after entry of judgment. (§ 2122, subd. (e).) Because wife sought modification nearly three years after entry of judgment, she is barred from asserting either duress or mistake as a basis for setting aside the judgment.

That leaves the final ground under section 2122, subdivision (a), actual fraud. (We apply the former version of the statute before amendments in 2001 which do not apply to the 1999 judgment in this case.) The statute provided: “Actual fraud where the

² Section 2128, subdivision (c) provides: “Nothing in this chapter is intended to restrict a family law court from acting as a court of equity.” Applying the doctrine that the enumeration of specific items implies the exclusion of others, the court in *Rubenstein v. Rubenstein*, *supra*, 81 Cal.App.4th at page 1148 concluded that only the remedies specifically listed in Chapter 10 apply to a motion for relief from a judgment.

³ Section 2121, subdivision (b) provides: “In all proceedings under this chapter, before granting relief, the court shall find that the facts alleged as the grounds for relief materially affected the original outcome and that the moving party would materially benefit from the granting of the relief.”

defrauded party was kept in ignorance or in some other manner, other than his or her own lack of care or attention, was fraudulently prevented from fully participating in the proceeding. Motions based upon fraud shall be brought within one year of the date on which the complaining party either did discover, or should have discovered, the fraud.”

Here, wife made no showing that could establish actual fraud as defined in the statute. She merely declared that husband had not listed the residence for sale and that he had encumbered the property after judgment. She did not show that she was prevented from participating in either the marital settlement agreement or the judgment of dissolution by some fraudulent means. If anything, she established her own lack of care or attention in failing to provide a date certain for the sale of the home in the marital settlement agreement.

Wife’s failure to satisfy the requirements of section 2122 is significant because it undermines the viability of the constructive trust imposed by the family court. The nature of a constructive trust also supports our conclusion that wife should have been required to meet her burdens under Chapter 10. “A constructive trust is not a substantive device but merely a remedy, and an action seeking to establish a constructive trust is subject to the limitation period of the underlying substantive right. If that substantive right is barred by the statute of limitations, the remedy necessarily fails. [Citation.]” (*Embarcadero Mun. Improvement Dist. v. County of Santa Barbara* (2001) 88 Cal.App.4th 781, 793.) Here, wife’s substantive right was to seek modification of the property distribution under Chapter 10. As we have discussed, each ground for relief under that chapter was barred by the applicable deadline of section 2122 except actual fraud, which was not established by wife’s declarations. There was no basis for the imposition of a constructive trust other than the family court’s implied finding that the distribution became inequitable when husband delayed listing the residence for sale and encumbered it. Section 2123 prohibits relief from a family law judgment on the sole grounds that it has become inequitable.

DISPOSITION

The order of May 21, 2003 is reversed. Each side is to bear its own costs.

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EPSTEIN, Acting P.J.

We concur:

HASTINGS, J.

CURRY, J.